

	12-2500-17084-2 P-442, 5798, 5340, 5826, 5025, 5643, 443, 5323, 5668, 4661/C-04-235
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STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Access Against AT&T Regarding Negotiated Contracts for Switched Access Services	<b>ORDER ON MOTION TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY OF GREGORY J. DOYLE</b>
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This matter is before Administrative Law Judge Steve M. Mihalchick on AT&T's motion to strike portions of the rebuttal testimony of Gregory J. Doyle. The record closed on November 3, 2006 with the receipt of the last brief on the motion.

Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, Saint Paul, MN 55101, appeared on behalf of the Department of Commerce (Department). Rebecca DeCook, Holland & Hart, LLP, 8390 East Crescent Parkway, Suite 400, Greenwood Village, CO 80111, appeared on behalf of AT&T. No filing was received from Lesley Lehr, Gray Plant Mooty, 500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-3796, on behalf of Verizon Business Services (formerly MCI Inc.). No filing was received from Joan C. Peterson, Corporate Counsel, 200 South Fifth Street, Room 2200, Minneapolis, MN 55402, on behalf of Qwest.

Based on the memoranda and file herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge issues the following:

**ORDER**

1. AT&T's Motion to Strike Portions of the Rebuttal Testimony of Gregory J. Doyle is DENIED.
2. This matter will proceed to hearing as scheduled in accordance with the prior order in this matter issued on June 26, 2006.

Dated: November 6, 2006

/s/ Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

## MEMORANDUM

### Motion Background

On October 26, 2006, AT&T filed a motion to strike the rebuttal testimony of Gregory Doyle ("rebuttal motion") that was submitted by the Department. The rebuttal motion is virtually identical to a motion to strike the direct testimony of that witness ("direct motion") that AT&T filed on September 7, 2006. The ALJ denied AT&T's direct testimony motion on October 23, 2006.<sup>1</sup>

The Department responded that its arguments in opposition to the rebuttal motion are the same as those in the direct motion. The Department also noted that the prior ALJ Order was issued only two days earlier than AT&T's rebuttal motion. The Department surmised that AT&T was unaware of the October 23, 2006, ALJ Order when the rebuttal motion was filed.

### Rebuttal Motion

In its rebuttal motion, AT&T maintains that considering evidence concerning possible motives and benefits to AT&T is improper without a finding of legal violation against AT&T as an IXC. AT&T also asserted that certain conversations related in the Doyle rebuttal testimony was inadmissible hearsay.

### Effect of October 23, 2006 Order

In the ALJ Order denying AT&T's direct motion, the "legal violation" argument was resolved as follows:

The terms of the AT&T-MCI contract, which AT&T notes is the only contract at issue, may well have been affected by the terms of other agreements described in the testimony at issue. The Department is certainly entitled to show what terms were in other, similar contracts between the AT&T CLEC and other IXCs as part of the

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<sup>1</sup> *ITMO Negotiated Contracts for Switched Access Services*, PUC Docket No. P-442, 5798, 5340, 5826, 5025, 5643, 443, 5323, 5668, 4661/C-04-235, OAH Docket No. 12-2500-17084-2 (ALJ Order on Motion to Strike Portions of the Testimony of Gregory J. Doyle issued October 23, 2006) (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=3374791>).

Department's case. Such testimony is relevant to the factors set out in Minn. Stat. § 237.262, subd. 2(b), to determine the appropriate penalty for statutory violations.<sup>2</sup>

The issues raised in the rebuttal motion regarding the need for legal violations by AT&T as an IXC are the same as those resolved in the prior order. AT&T's rebuttal motion to strike testimony relating to AT&T's conduct is DENIED.

### **Hearsay**

AT&T notes that the Doyle rebuttal testimony refers to "numerous out of court statements made by other CLECs."<sup>3</sup> AT&T maintains that these statements are being offered as to the truth of the matter asserted and thereby constitute inadmissible hearsay evidence.

A prominent example of such testimony is the discussion between Doyle and Jaguar Communications regarding AT&T's history of paying tariffed rates and discussions between AT&T and Jaguar Communications regarding what amounts will be paid. In that testimony, Doyle relates his conversation with an unnamed person at Jaguar Communications regarding AT&T's tariffed rate payments. The unnamed person also related a portion of a conversation with an unnamed AT&T representative regarding AT&T's willingness to pay only a portion of past bills.<sup>4</sup>

The rules of evidence in contested case proceedings are set out in Minn. Rule 1400.7300. Subpart 1 of that rule addresses hearsay, stating:

The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. The judge shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded.<sup>5</sup>

As an investigator, Doyle engages in conversations with persons affiliated with regulated entities as part of the ongoing duties he performs for the Department. Conversations such as these are the sort of evidence on which reasonable, prudent persons are accustomed to rely upon in the conduct of their serious affairs. The rebuttal testimony meets the standard for admissibility in the

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<sup>2</sup> *Id.* at 5.

<sup>3</sup> AT&T Rebuttal Motion, at 5.

<sup>4</sup> Doyle Rebuttal Testimony, at 9

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=3326842>).

<sup>5</sup> Minn. Rule 1400.7300, subp. 1.

contested case rules. Further, Doyle will be available for cross-examination to demonstrate the reliability of the statements as proof of the matter asserted.<sup>6</sup>

The Department has shown that its offered testimony is relevant to issues that remain in this proceeding. The testimony is admissible under the contested case rules. AT&T's rebuttal motion to strike is DENIED.

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<sup>6</sup> And as for the truth of the matter asserted, AT&T should certainly be able to demonstrate what amounts it has paid to any CLEC over the time periods identified in the out-of-court conversations.